



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1995

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR95-999

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34789.

The Texas Department of Transportation (the "department") received a request for barricade reports and diary entries for certain dates in 1994. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision

Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, where a requestor publicly states on more than one occasion an intent to sue, that alone does not trigger section 552.103(a). Open Records Decision No. 452 (1986); *see* Open Records Decision No. 361 (1983) (fact that request for records made by attorney not enough to trigger § 552.103(a)). You state that there is currently pending litigation involving the department construction site to which the requested documents relate. You claim that although the department is not currently a party to that litigation, the department may be joined in the lawsuit by one of the parties. However, you have not submitted a written demand upon the department by any of the parties to this lawsuit or other evidence of any threat of litigation against the department. Therefore, we conclude that the department has not established that litigation is anticipated and may not withhold the requested documents under section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Ref.: ID# 34789

Enclosures: Submitted documents

